1999

State of Utah v. Brian James Rudolph : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. BRIAN JAMES RUDOLPH, Defendant/Appellant.	*Case No. 990534-CA* Priority No. 2

BRIEF OF APPELLEE

DEFENDANT APPEALS FROM HIS CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM B. BOHLING, JUDGE, PRESIDING.

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Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996) ("pour-over" provision).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Has defendant established plain error or exceptional circumstances to justify appellate review of his unpreserved challenge to the legal sufficiency of the evidence?

Because defendant admits that he failed to preserve this issue, this Court should refuse to address the sufficiency claim for the first time on appeal unless defendant establishes the ineffectiveness of his trial counsel, plain error by the trial court, or exceptional circumstances justifying review. ***State v. Irwin***, 924 P.2d 5, 7-8 (Utah App.

1996), *cert. denied*, 931 P.2d 146 (Utah 1997). ***Accord Julian v. State***, 966 P.2d 249, 258 (Utah 1998); ***State v. Vessey***, 967 P.2d 960, 965 (Utah App. 1998).

2. Alternatively, to the extent defendant's closing argument preserved a general challenge to the factual sufficiency of the evidence, does the evidence provide a reasonable basis for the jury's verdict?

An appellate court assumes that the jury "believed the evidence and inferences which support the verdict" and upholds the conviction unless the marshaled evidence, viewed in the light most favorable to the verdict, is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." ***State v Chaney*** , 1999 Utah Ct. App. 309, ¶ 30, 381 Utah Adv. Rep. 15 (Utah Ct. App.) (citing ***State v. Brown***, 948 P.2d 337, 343 (Utah 1997); ***State v. Wood***, 868 P.2d 70, 87 (Utah 1993); and ***State v. Johnson***, 821 P.2d 1150, 1156 (Utah 1991)) (quotation marks omitted).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Copies of the following relevant statutes and rules are included in Addendum A:

Utah Code Ann. § 76-6-302 (1999) (aggravated robbery)
Utah Rules of Criminal Procedure, Rule 17 (Trial Proceedings)
Utah Rules of Criminal Procedure, Rule 23 (Arrest of Judgment)
Utah Rules of Criminal Procedure, Rule 24 (Motion for New Trial)
Utah Rules of Civil Procedure, Rule 50 (Motion for Directed Verdict and Judgment Notwithstanding the Verdict)
Utah Rules of Civil Procedure, Rule 59 (Motion for New Trial)
Federal Rules of Criminal Procedure, Rule 29 (Motion for Judgment of Acquittal).

STATEMENT OF THE CASE

On January 23, 1998, an information charged defendant with two counts of aggravated robbery (R. 2-4). Count I charged defendant with the January 18, 1998, armed robbery of the Travelodge Motel, 524 South West Temple, Salt Lake City, Utah, in which approximately $700 was taken; Count II charged defendant with the January 20, 1998, armed robbery of the Deseret Inn Motel, 50 West 500 South, Salt Lake City, Utah, in which approximately $850 was taken (*id.*). Prior to the preliminary hearing, a formal line-up was conducted at defendant's request which resulted in defendant being identified as the Deseret Inn robber (R. 23-24;R.156: 93-94).[1] Following a preliminary hearing, defendant was bound over on both counts (R. 26).

Subsequently, the two counts were severed at defendant's request (R. 17). The case then proceeded to trial on what was originally Count II of the Information, the Desert Inn aggravated robbery (R. 2-4, 32). Following a two-day jury trial, defendant was convicted as charged (R. 76-77, 117-119). On March 22, 1999, he was sentenced to the statutory term of five years-to-life imprisonment, to run concurrently with the sentence he was already serving (R. 124-25).[2] After receiving an extension of time in which to file a

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[1] Mr. Greg Davis, the Deseret Inn motel clerk, positively identified defendant (R.156: 93-93). The record does not reflect whether other individuals connected with either robbery participated in the line-up.

[2] Following defendant's sentencing in this case, and his guilty plea in an unrelated theft case, the State dismissed the Travelodge charge (R. 147-48).

notice of appeal, defendant timely appealed (R. 127-33, 135).

STATEMENT OF FACTS[3]

On January 20, 1998, Greg Davis was employed as the front desk clerk for the Deseret Inn Motel (R.156: 65-66, 69-70). When he began his shift at 4:00 p.m., he counted the money in the cash drawer; there was $400.00 (R.156: 69, 86). Over the next two to three hours, he took in approximately $400.00 to $450.00 dollars, resulting in a total of $800.00 to $850.00 in cash in the motel's cash box (R.156: 85-87, 101).

Around 6:00 p.m., defendant entered the well-lit lobby of the motel (R.156: 69, 72-74, 76, 133). Mr. Davis, who was alone, was immediately aware of defendant because the motel's front door "chimes" when opened (R.156: 70-71). Based on prior experience, Mr. Davis was "wary" and "somewhat frightened" when defendant approached with both his hands in his front pockets (R.156: 75). For this reason, Mr. Davis continually watched defendant as he walked across the lobby (R.156: 70-71, 74, 94-95).

Defendant stopped very close to the counter, leaving only two and one-half to three feet between himself and Mr. Davis (R.156: 70-71). Defendant's face was uncovered (R.156: 74). Mr. Davis, who was wearing his glasses which gave him 20/20 vision, had a "good view" of defendant; Mr. Davis was undistracted as he observed

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[3] Except as otherwise noted, the facts are stated "in the light most favorable to the jury's verdict." ***Chaney***, 1999 Utah. Ct. App. 309, ¶ 30, 381 Utah Adv. Rep. 15 (citing ***Brown***, 948 P.2d at 343). The trial transcripts are externally numbered as R.156 and R. 157. Internal pages of each volume are designated as (R.156: 3).

defendant's face, hair length, hair color, height, weight, skin color, age, and clothing, which consisted of a long gray sweater and baggy blue pants (R.156: 74-75, 89). Mr. Davis observed a plain metal hoop earring in each of defendant's ears (R.156: 129-31). Defendant also smelled strongly of what Mr. Davis assumed was "hair gel" since defendant's hair was "moussed and spiked" (R.156: 91).

Defendant asked the price of a room and Mr. Davis responded (R.156: 76). Defendant said that the price sounded "good"(R.156: 77). Mr. Davis waited a moment to see if defendant was going to request a room (***id.***). Defendant instead "pulled a gun out of his right front pants pocket and said, "why don't you give me, you know, the money in the till" (***id.***). Defendant repeated, "give me the money, give me the money" (R.156: 80). Mr. Davis's "first impulse was to reach for the gun" which was held by defendant in his right hand, slightly above his waist line, pointing generally in Mr. Davis's direction (R.156: 78-79). Mr. Davis decided "no, this is serious, I could get hurt" and moved quickly to the cash drawer which was five feet to his right (R.156: 80). Mr. Davis removed the wooden cash box and placed it on the counter in front of defendant (R.156: 80-81). As soon as defendant reached into the box to remove the cash, Mr. Davis moved back into a small room directly behind the counter and locked the door to avoid being shot (R.156: 81-83). Mr. Davis stayed in the room until he heard the lobby door chime again, indicating defendant had left (R.156: 83-84).

Just as Mr. Davis came out of the room, Leonard McCann, a customer, walked into

the lobby (R.156: 84). Mr. McCann had been in his car in the motel's carport area in front of the glass wall of the lobby (R.156: 104). Believing the man at the counter was just registering, Mr. McCann waited outside and only walked in as the man exited (*id.*) Mr. McCann noticed that the man was about his same height with a medium build (*id.*). Mr. Davis told Mr. McCann he had been robbed (R.156: 105). Within "30 seconds," Mr. McCann went back outside to see if he could determine where the robber went (R.156: 106-07). About 150 feet from the motel, Mr. McCann saw

> this individual going down the street. He was moving at a – he wasn't running and he wasn't walking, he was just going pretty fast. And he looked like he didn't know where he wanted to go. He kinda looked out at the street and out at the other direction like he was trying to decide where he wanted to go.

(R.156: 106-07). Mr. McCann made "mental notes" of what the man was wearing, knowing that he would be asked to later identify him (R.156: 113). The man wore a white shirt, which Mr. McCann thought might be a turtleneck since so much of it showed above the wide collar of the man's gray loose fitting sweater; the man also wore baggy pants of a brighter blue color than traditional dark levis (R.156: 108-13). The man appeared headed for the Hilton Hotel, which was about a block west of the Deseret Inn (R.156: 107, 116-17).

After receiving the report of the robbery and a description of the suspect, the police began canvassing the area around the Hilton Hotel (R.156: 115-17, 119). Two plain-clothed detectives went into the Hilton, where they observed defendant at a public

telephone in the lobby area, about seventy feet from the hotel's restaurant Annabelle's (R.156: 119-20, 124-25, 149-50). Even though defendant did not have on a gray sweater and had on glasses, he otherwise matched the description of the robber in that

> he was wearing a white shirt, his hair was, appeared to be wet like he had just wet it down and dried it with a towel, kinda sticking up and kind of in a spiked look, wearing levi's, had the earrings.

(R.156: 121-23). The police stopped defendant for questioning (R.156: 125). Defendant told one officer that he was meeting a male friend, Ed Bernard (R.156: 125). A few minutes later, he told a different officer that he had was meeting his girlfriend, Melanie Swallow, for dinner (R.156: 150-51).

As the officers detained defendant in a small glassed-in business office inside the hotel, Angela Dent, an Annabelle's employee, walked past (R.156: 166). She immediately and spontaneously recognized defendant as having been in the restaurant twenty minutes before (R.156: 165-67).[4] Ms. Dent said defendant entered the restaurant wearing a gray sweater (R.156: 165). Because the restaurant was crowded and seating was limited, Ms. Dent asked defendant if there was "only one in his party,"and he replied "yes" (R.156: 163). About ten minutes after she seated him, Ms. Dent returned to the table to make sure defendant had been served (R.156: 164). Defendant was gone but the

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[4] A year later at trial, Ms. Dent could not "definitely" identify the person who had entered the restaurant; however, she maintained that the man detained by the police was the same man who entered the restaurant (R.156: 163, 165-65). It is undisputed that defendant was the person Ms. Dent saw with the police.

gray sweater was left at the table (R.156: 165). Ms. Dent turned the sweater over to the police (R.157: 165; Exhibit 11).

Despite Ms. Dent's identification, defendant insisted that he had not been in the restaurant and that the gray sweater was not his (R.156: 126). He claimed to have no coat even though it was a cold winter night (R.156: 125-26; R.157: 175).

The police brought the clerk, Greg Davis, from the Deseret Inn to the Hilton to see if he could identify defendant (R.156: 90). Defendant was still in the glassed-in hotel business office with some officers (R.156: 90, 98-99).[5] Viewing defendant through the glass wall of the office, Mr. Davis said he was not "100 per cent" certain if defendant was the robber:

> [Defendant] didn't have the sweater on. His hair, when he robbed me, had been moussed and spiked. His hair, when I saw him at the Hilton, had been smoothed down. He did not have glasses on when I saw him. At the Hilton he had glasses on.

(R.156: 91). Mr. Davis believed, however, that all of defendant's other features and characteristics were consistent with the robber's, including his height, weight, sex, age, color of skin, length of hair, and color of hair (R.156: 89, 92-93. At trial, Mr. Davis also testified that defendant's clothing, including his earrings, pants, and the gray sweater

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[5] Because defendant never challenged the circumstances surrounding the show-up, it is unclear if defendant was with the plain-clothed officers who had originally detained him (R.156: 119, 125, 149-50, 152-53), or whether other uniformed officers or hotel security officers were in the room during the show-up (R.156: 135, 152-53, 166, 169-70). In any case, no one described defendant as under arrest or physically handcuffed.

retrieved by Ms. Dent, were consistent with the robber's (R.156. 89, 129-30; Exhibits 11, 13 & 15).[6]

Mr. McCann agreed that the gray sweater found in the restaurant and defendant's blue baggy pants were consistent in color and shape with the clothing of the man he saw walking away from the Deseret Inn immediately after the robbery (R.156: 109-112; Exhibits 11, 12 & 13). Additionally, an officer near defendant, inside the hotel business

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[6] Defendant claims that Mr. Davis was only "50 percent sure" that defendant was the robber because of the three changes noted and also because defendant did not smell of "cologne" and wore "different" earrings; defendant characterizes Mr. Davis's identification as "tentative"and "weak" and claims that Mr. Davis "failed to identify" defendant (*see* Brief of Appellant [Br. App.] at 7, 11, 22, 24). This is not a correct, marshaled recitation of the facts.

Mr. Davis testified he was less than "100 percent" certain at the show-up because of the change in clothing and hairstyle and the addition of the glasses (R.156: 91-92, 99-100). A police report stated that Mr. Davis was "50% sure" in the show-up that defendant was the robber (R.156: 174). Mr. Davis explained that when pressed by the police to give some percentage of certainty during the show-up, he may have said 50 or 70 percent but knew that he just "wasn't 100 percent" certain (R.156: 92-93, 99-100). He stated that he positively identified defendant in a subsequent line-up (R.156: 93-94), and had "no doubt" at trial that defendant was the person who had robbed him (R.156: 94). All of this testimony was admitted without objection.

When defense counsel asked Mr. Davis whether defendant smelled of cologne when he viewed him at the Hilton, Mr. Davis responded that they were separated by a glass partition (R.156: 99). While the police report, referred to above, stated that defendant did not smell of cologne at the Hilton (R.157:174), a different officer testified that defendant's hair was wet (R.156: 91, 170-71, 173, 195-96, 202-04), a fact, which if true, would account for the lack of hair gel smell. Mr. Davis further testified that the metal hoop earrings removed from defendant were "consistent" with those he observed during the robbery, even though he remembered the earrings as being plain and possibly "slightly larger" (R.156: 129-30; Exhibit 15).

As will be discussed, these differences went to the weight of the evidence and not its admissibility.

office, described defendant's hair as "semi-wet," as if it had been recently wetted, pushed back and was now drying (R.157: 170).[7]

That same evening, a hotel housekeeper emptied the trash from the public restroom directly across from Annabelle's Restaurant and closest to the telephone where defendant was arrested (R.156: 123-25,142-43). The housekeeper found a Crossman BB gun hidden underneath a plastic garbage bag (R.156: 143-46, 151; Exhibit 14). Mr. Davis stated that the gun appeared to be the same as the one used in the robbery (R.156: 77-78; Exhibit 14).

When defendant was booked into jail, $850.00 in cash was found hidden inside his shoes (R.156: 137-38). This was the same amount of cash estimated to have been taken during the robbery (R.156: 86).

The jury convicted defendant of aggravated robbery (R. 117).

SUMMARY OF ARGUMENT

Defendant did not request a ***Ramirez***[8] hearing to challenge the pre-trial identifications by Mr. Davis, Ms. Dent, or Mr. McCann. Nor did defendant object to the

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[7] The prosecutor argued that defendant's wet hair supported the inference that he had attempted to wash or rinse it after the robbery (R.157: 202-04). Defense counsel agreed that the evidence supported the inference that defendant may have changed his hairstyle but then argued, based on Mr. Davis's identification at the Hilton, that defendant's hair was just "different" than the robber's (R.157: 195-96).

[8] ***State v. Ramirez***, 817 P.2d 774 (Utah 1991) (defense may request a pre-trial determination of the constitutional admissibility of an eyewitness identification).

Mr. Davis's in-court identification of defendant and his clothing, or the in-court identifications of the clothing by Ms. Dent and Mr. McCann. Similarly, defendant did not move for a dismissal, an arrest of judgment, or a new trial on the grounds of insufficient evidence. Despite these omissions, defendant claims that he may challenge the legal sufficiency of the evidence, that is, the sufficiency of Mr. Davis's identification of defendant, for the first time on appeal because the sufficiency of the evidence is of "such vital importance" in a criminal case, that a criminal defendant need not abide by normal preservation rules. In the alternative, defendant claims that this Court should consider his claim under the "plain error" or "exceptional circumstances" exceptions to the preservation requirement.

Contrary to defendant's assertion, the Utah appellate courts, the majority of state courts, and the federal courts recognize only three exceptions to the preservation requirement. An appellate court will review an unpreserved issue, even a constitutional one, for the first time on appeal, only if the defendant establishes the ineffectiveness of his trial counsel, plain error by the trial court, or exceptional circumstances justifying review. Defendant's attempts to craft a fourth exception to the preservation requirement – an exception which would apply in virtually every criminal case – is reminiscent of the disavowed ***Breckenridge***[9] "liberty interest" standard. More importantly, a fourth exception to the preservation requirement is unnecessary. Utah appellate courts, in line

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[9] ***State v. Breckenridge***, 688 P.2d 440 (Utah 1983).

with the majority view, already recognize that where the prosecution wholly fails to establish a requisite element, the established exceptions of ineffective counsel, plain error, or exceptional circumstances will justify reversal.

In this case, allowing defendant to challenge the legal sufficiency of the identification evidence for the first time on appeal would also smack of "invited error." Despite the obvious availability of the established exception of ineffective counsel, defendant has chosen not to allege his counsel's ineffectiveness on appeal. The reason for that choice is apparent: the record establishes that trial counsel's decision not to challenge the legal sufficiency of Mr. Davis's identification was a conscious, strategic choice. Trial counsel, who is also defendant's appellate counsel, needed the discrepancies noted by Mr. Davis during the Hilton Hotel show-up to argue that those "differences" undermined the weight the jury should give to the remaining evidence. Indeed, trial counsel argued below that Mr. Davis's show-up identification was the "freshest" identification and, therefore, the "most likely to be accurate" (R.157: 190-91). Yet, on appeal, counsel now argues that the show-up identification was inherently unreliable because it was unduly suggestive (Br. App. at 11, 24-26). It is this type of change in position – a change which unfairly prevents full development of the issue below – that is one of the dangers the preservation requirement was created to avoid.

For much the same reason, the trial court had no reason to sua sponte question the reliability and, therefore, admissibility, of Mr. Davis's identification of defendant. And

based on Mr. Davis's identification of defendant, the other identifications of defendant's clothing, and the remaining circumstantial evidence, the trial court had no reason to sua sponte question the legal sufficiency of prosecution's evidence, or ultimately, the jury's verdict. In sum, defendant has failed to establish plain error or exceptional circumstances to justify his failure to preserve his legal sufficiency argument.

Alternatively, to the extent that defendant claims his general defense against the charges preserved his current sufficiency challenge, the issue is limited. Defendant's failure to move for dismissal constitutes an implicit admission that the prosecution evidence was legally sufficient for submission to the jury, i.e., that the prosecution had established a prima facie case from which a jury *could* convict defendant. If a jury could legally convict defendant, the only issue possibly remaining is one of fact: whether a reasonable jury *would* convict defendant. Here, the evidence overwhelmingly provided the jury with a reasonable basis to convict defendant.

ARGUMENT

POINT I

DEFENDANT HAS FAILED TO ESTABLISH PLAIN ERROR OR MANIFEST INJUSTICE TO EXCUSE HIS FAILURE TO OBJECT TO THE LEGAL SUFFICIENCY OF THE EVIDENCE; THEREFORE, HE IS PRECLUDED FROM RAISING THIS ISSUE FOR THE FIRST TIME ON APPEAL

A. There is No Legal or Policy Justification for Creating a New Exception to the Preservation Requirement.

Utah appellate courts have long followed the established rule that issues, including

constitutional issues, which have not been preserved in the lower courts by specific objection, will not be considered for the first time on appeal unless the appellant establishes the ineffectiveness of his trial counsel, plain error by the trial court, or exceptional circumstances to justify their review. ***State v. Irwin***, 924 P.2d 5, 7-8 (Utah App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997). ***Accord Julian v. State***, 966 P.2d 249, 258 (Utah 1998) (citing ***State v. Lopez***, 886 P.2d 1105, 1113 (Utah 1994)); ***State v. Vessey***, 967 P.2d 960, 965 (Utah App. 1998). Under these limited exceptions, an appellant must establish that his trial counsel's performance was prejudicially defective, the trial court committed obvious prejudicial error, or that such "exceptional or unusual circumstances" exist such that it would be "manifestly unjust" not to review the unpreserved issue. ***Irwin***, 924 P.2d at 7 (citing ***State v. Dunn***, 850 P.2d 1201, 1208-9 (Utah 1993); ***State v. Archambeau***, 820 P.2d 920, 923 (Utah App. 1991); and ***State v. Humphries***, 818 P.2d 1027, 1029 (Utah 1991)).[10]

Defendant claims that a fourth exception to the preservation requirement exists: a

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[10] As noted in ***Irwin***, 924 P.2d at 10 n.5, the use of the term "manifest injustice" can be misleading. "Manifest injustice" is sometimes used to define "exceptional circumstances," in the sense of those truly exceptional cases involving "rare procedural anomalies." ***See e.g. Irwin***, 924 P.2d at 11; ***Dunn***, 850 P.2d at 1209; ***State v. Kazda***, 545 P.2d 190, 193 (Utah 1976). But the term more commonly equates to plain error. ***State v. Chaney***, 1999 Utah Ct. App. 309, ¶ 54, 381 Utah Adv. Rep. 15 (Utah Ct. App.); ***State v. Rudolph***, 970 P.2d 1221, 1226 (Utah 1998); ***State v. Jones***, 823 P.2d 1059, 1061 (Utah 1991); ***State v. Perdue***, 813 P.2d 1201, 1206 (Utah App. 1991); ***State v. Cobo***, 60 P.2d 952, 958-59 (Utah 1936). In fact, numerous jurisdictions refer to plain error as "fundamental error." 3 Wayne R. LaFave & Jerold H. Israel, ***Criminal Procedure*** § 26.5(d), at 255 n.71 (1984).

criminal defendant need not move for dismissal, for arrest of judgment, for new trial or otherwise preserve a sufficiency claim because a defendant has the "fundamental right" not to be convicted based on insufficient evidence. While the latter is true, defendant's assertion that a fourth exception exists is specious and against the weight of Utah, other state, and federal authority. Moreover, a fourth exception is unnecessary under the current standard. ***Archambeau***, 820 P.2d at 926 (recognizing that existing exceptions to preservation rule are "sufficiently broad to encompass any situation requiring Utah's appellate courts to consider a constitutional issue for the first time on appeal in the interest of justice").

Defendant begins with the axiom that a criminal conviction based on legally insufficient evidence is unconstitutional. ***Compare Jackson v. Virginia***, 443 U.S. 307, 317-24 (1979) (federal court may reverse state court decision on habeas review if it finds that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt;" citing ***In re Winship***, 397 U.S. 358, 364 (1970), for requirement of proof of all elements beyond a reasonable doubt), ***with Herrera v. Collins***, 506 U.S. 390, 402 (1992) (a ***Jackson***-type review only determines if there is an "independent constitutional violation of ***Winship***; it does not focus on whether the trier of fact made the "correct guilt or innocence determination"). From this, defendant improperly conjectures that a criminal defendant need not preserve a legal sufficiency claim in the same way he or she is required to preserve all other constitutional claims.

A handful of jurisdictions do exempt sufficiency claims from their normal preservation requirements through statute or rule.[11] However, the majority of jurisdictions recognize that:

> [t]o entitle an appellant in either a civil or criminal case to urge [on appeal] that the evidence was insufficient to sustain the verdict of the jury, he must, at the close of all the evidence, have interposed in the trial court a motion either for a directed verdict in a civil case or for judgment of acquittal in a criminal case. By this procedure the question of the sufficiency of the evidence becomes a question of law which the court will consider on appeal. It is well settled that absent such motion [the appellate court] will not review the evidence. Appellant may not for the first time on appeal raise the question of the sufficiency of the evidence. It is equally well settled that an appellant who interposes a motion for a directed verdict at the close of plaintiff's evidence in a civil case, or a motion for judgment of acquittal at the close of the government's evidence in a criminal case, who thereafter introduces testimony in his defense, thereby waives his motion unless he renews it at the close of the evidence.

McDonough v. United States, 248 F.2d 725, 727 (8th Cir. 1957). In other words,

> Upon the trial of a jury case, in order to preserve for review the question of the sufficiency of the evidence, a party who believes that he is entitled to a verdict as a matter of law must, at the close of all the evidence, make a

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[11] ***See e.g. State v. Granby***, 939 P.2d 1006, 1008 (Mont. 1997) (recognizing preservation requirement followed in federal courts but concluding that Montana statute permits a sufficiency claim to be raised for the first time on appeal); ***State v. Green***, 691 So.2d 1273, 1275-76 (La. App. 1997) (Louisiana criminal procedure rule permits a sufficiency claim to be raised for the first time on appeal); ***State v. Ashley***, 889 P.2d 723, 724-25 (Idaho App. 1995) (Idaho civil procedure rule permitting a sufficiency claim to be raised for the first time on appeal also applies to criminal cases). ***See also*** North Carolina Code § 15A-1446(d)(5) (exempting legal sufficiency claims from preservation requirements); Pennsylvania Rules of Criminal Procedure, Rule 1124(A)(7) (sufficiency claim may be raised for the first time on appeal).

Without noting the limited scope of these cases, defendant improperly cites them in support of his constitutional argument. ***See*** Br. App. at 13-14 n.4.

> motion for a directed verdict in his favor and secure a ruling thereon from the trial court.

Id. (quotation marks and citation omitted). ***Accord United States v. Santistevan***, 39 F.3d 250, 256 (10th Cir. 1994) (failure to move for judgment of acquittal precludes review of sufficiency claim for the first time on appeal but appellate court may sua sponte review for plain error or "manifest miscarriage of justice"); ***United States v. Atkinson***, 990 F.2d 501, 502-03 (9th Cir. 1993) (en banc) (failure to preserve sufficiency claim through motion for acquittal waives appellate review but court may review for plain error or to "avoid a manifest miscarriage of justice"); ***United States v. Zolicoffer***, 869 F.2d 771, 773 (3rd Cir.) (federal criminal procedural rules preclude appellate review of unpreserved sufficiency claims; only exceptions are plain error and manifest injustice), *cert. denied*, 490 U.S. 1113 (1989); ***Long v. Smith***, 663 F.2d 18, 21 (6th Cir. 1981) (state supreme court correctly ruled that sufficiency claim was waived where defendant failed to move for a directed verdict; however, claim of error in jury instruction could be reviewed for plain error), *cert. denied*, 455 U.S. 1024 (1982); ***United States v. Jones***, 486 F.2d 1081, 1082 (5th Cir. 1973) (where defendant fails to move for a directed verdict, sufficiency claim is not preserved for appeal absent a "manifest miscarriage of justice"); ***Hall v. Wal-Mart Stores, Inc.***, 959 Utah 109, 111 n.1 (Utah 1998) (normally failure to move for directed verdict precludes appellate review) (citing ***Hansen v. Stewart***, 761 P.2d 14, 15 n.1 (Utah 1988)). ***Cf. Promax Development Corp. v. Mattson***, 943 P.2d 247, 255-56 (Utah App.) (unlike jury trials, rule 52, Utah Rules of Civil Procedure, does not require preservation of

sufficiency issues when the "action is tried without a jury"), *cert. denied*, 953 P.2d 449 (Utah 1997). ***See also State v. Moriarty***, 914 S.W.2d 416, 421-22 (Mo. App. 1996) (plain error justified review of unpreserved claim of fundamental instructional error); ***State v. Puaoi***, 891 P.2d 272, 278 (Hawai'i 1995) (absence of material element constitutes plain error justifying appellate review); ***State v. Jannamon***, 819 P.2d 1021, 1025 (Ariz. App. 1991) (court will review unpreserved sufficiency claim for "fundamental error" where there was no evidence to support crime charged); ***Casadas v. People***, 304 P.2d 626, 627 (Colo. 1956) (en banc) (unpreserved claim of insufficiency was reviewed on appeal because of "total failure" of proof which amounted to "patent" error).[12]

While no Utah case has explicitly discussed this preservation requirement in the context of a criminal sufficiency claim, the Utah criminal procedure rules governing dismissals, directed verdicts, and new trials contain essentially the same language as that found in the Federal Rules of Criminal Procedure and the Utah Rules of Civil Procedure. ***Compare*** Utah R. Crim. P. 17(o), 23 & 24, ***with*** Utah R. Civ. P. 50 & 59, ***and with*** Fed. R. Crim. P. 29. (Copies of the rules are attached in Addendum A). Indeed, no Utah case has recognized any difference between the preservation requirements for a criminal as

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[12] In citing to these other state cases, defendant claims that their discussion of "fundamental error" amounts to a recognition of a fourth exception to the normal preservation requirement distinct and separate from the existing exceptions of ineffective counsel, plain error or unusual circumstances (Br. App. at 12-18). This is not correct. Universally, "fundamental error"is treated as simply another expression of plain error or exceptional circumstances. ***See*** discussion in footnote 10, *supra*, at 14.

opposed to civil case. ***Irwin***, 924 P.2d at 7-11; ***Archambeau***, 820 P.2d at 922-26.

Nor should there be any difference in the preservation requirements for civil and criminal cases because the rationales behind the "raise-or-waive" rule apply equally to both. Those rationales include the recognition:

> "that [the preservation rule] is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided has an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public could be spared the expense of an appeal."

3 Wayne R. LaFave and Jerold H. Israel, ***Criminal Procedure*** § 26.5(c), at 251-52 (1984) (quoting ***State v. Applegate***, 591 P.2d 371, 373 (Or. App. 1979)).[13]

Turning to the specifics of defendant's claim, defendant asserts that he should be able to challenge the sufficiency of the identification evidence for the first time on appeal

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[13] Similar concerns were recognized by this Court in rejecting the overly broad concept of "liberty interest" as a new exception to the preservation rule in criminal cases. ***Irwin***, 924 P.2d at 11 (acceptance of ***State v. Breckenridge***, 688 P.2d 440 (Utah 1983) "liberty interest" as a separate exception to the preservation requirement would erode requirement that parties carry the burden of their own arguments); ***Archambeau***, 820 P.2d at 925 (***Breckenridge*** "liberty interest" doctrine would permit exception to "swallow the general rule" of preservation in criminal cases).

despite his failure to challenge the legal sufficiency of the evidence below. While defendant admits he did not move for dismissal, directed verdict, or new trial, he does not acknowledge his other significant omissions: he did not move for a ***State v. Ramirez***, 817 P.2d 774 (Utah 1991), hearing to test the reliability of the pre-trial identifications and he did not object to any in-court identification of defendant or his clothing. These omissions are significant because defendant's argument is not that the prosecution evidence, if believed, is insufficient for conviction. Instead, his argument is that the evidence is necessarily insufficient because its "foundation" – Mr. Davis's identification of defendant – is the unreliable result of impermissible suggestion. ***See e.g.*** Br. App. at 11 ("show-up was highly suggestive . . . Mr. Davis' subsequent identifications are not persuasive because he had been exposed to Mr. Rudolph at the show-up"); at 17 ("whether the State had presented sufficient evidence that Mr. Rudolph was the assailant despite the lack of positive identification"); at 22 (Mr. Davis' show-up identification is the "foundation of the State's entire case . . . [i]f that foundation was faulty, the State's case, like a building, collapses"). ***See also*** Br. App. at 24-26 (discussing various ***Ramirez***-type factors of why show-up and subsequent identifications should be disregarded). Because defendant failed to challenge the legal reliability – and therefore admissibility – of any identification below, he is precluded from doing so for the first time on appeal absent plain error or exceptional circumstances. ***Lopez***, 886 P.2d at 1113 (failure to object to photo array or in-court identification at trial precluded appellate

review of due process claim); ***State v. Olsen***, 860 P.2d 332, 335 (Utah 1993) (failure to object to eyewitness identification on constitutional grounds when the trial court admitted the evidence precluded appellate review); ***State v. Larocco***, 665 P.2d 1272 (Utah 1983) (failure to object to line-up and photo array evidence at trial precluded review on appeal); ***State v. Wilson***, 608 P.2d 1237, 1239 (Utah 1980) (failure to object to in-court identification waives issue on appeal).

B. Defendant Has Failed to Establish Plain Error.

Relying on the Utah Rules of Criminal Procedure, defendant claims that the trial court "obviously" erred in failing to sua sponte dismiss, arrest judgment, or grant a new trial based on insufficient evidence (Br. App. at 18-19).[14] Again, while defendant's initial proposition is true – a court may sua sponte dismiss, arrest judgment, or grant a new trial for insufficient evidence – his conclusion is not.

Rules 17(o), 23 and 24, Utah Rules of Criminal Procedure, permit a trial court to sua sponte dismiss an information , arrest judgment, or grant a new trial if the trial court is convinced that the evidence is legally insufficient. But the criminal rules provide no greater power to a trial court judge in a criminal case than do the civil procedure rules in a civil case. In both cases, the court's power to act independently from counsel does not

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[14] A party claiming plain error must establish that: "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, [the appellate court's] confidence in the verdict is undermined." ***Dunn***, 850 P.2d at 1208-09.

negate a party's concurrent obligation to preserve issues that the party wishes to raise on appeal. ***See*** cases discussed, *supra*, at 16-18.

Furthermore, a court cannot be faulted for allowing a case to go to the jury, or allowing a subsequent jury verdict to stand, when the prosecution has established at least "some evidence" to support each element of the crime from which a reasonable jury could find guilt beyond a reasonable doubt. For under these circumstances, it is the exclusive province of the jury to determine the weight to be accorded that evidence. ***Chaney***, 1999 Utah Ct. App. 309, ¶ 30, 381 Utah Adv. Rep. 15.

Here, defendant does not claim that there is no evidence to support each element of the crime (R.157: 200-01). Instead, he asserts that the jury should not have accorded the identification evidence full weight (Br. App. at 22-26). But weight is uniquely a jury function. ***Chaney***, ***id.*** Thus, even under defendant's reading of the facts, a dismissal, arrest of judgment, or new trial here would constitute an impermissible invasion of the province of the jury.[15]

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[15] Even in the cases cited by defendant which considered an unpreserved sufficiency claim for the first time on appeal, no court reversed where there was *some evidence* presented to support each element. ***See e.g. State v. Adams***, 623 A.2d 42, 46-47 (Conn. 1993) (finding conflicted circumstantial evidence sufficient to sustain verdict); ***Smith v. State***, 213 A.2d 861 (Del. 1965) (circumstantial evidence sufficient to sustain conviction, especially in light of unreasonableness of defendant's theory). Only where there was *no evidence* to support a requisite element was reversal warranted under either a plain error or "manifest injustice" concept. ***See e.g. Santistevan***, 39 F.3d at 256-57 (plain error and exceptional circumstances justified sua sponte reversal where there was no evidence of material element); ***Pauoi***, 891 P.2d at 278 (plain error justified reversal where there was no evidence of material element even though issue was not preserved);

The trial court also had no obligation to sua sponte question the admissibility of the eyewitness identification when defendant did not move for a ***Ramirez*** hearing and did not object to the admission of the various identifications during trial. ***Cf. Lopez***, 886 P.2d at 1113 (finding no plain error or exceptional circumstances to justify review of unpreserved challenge to eyewitness identification); ***Olsen***, 860 P.2d at 335 (applying "raise or waive" rule to eyewitness identification evidence). ***Compare State v. Nelson***, 950 P.2d 940, 943 (Utah App. 1997) (trial judge commits error if he or she fails to make ***Ramirez*** findings when requested).

It was apparent that defense counsel was fully aware of the eyewitness issue but strategically chose to forego any objections to Mr. Davis's show-up identification so that he could use the discrepancies noted by Mr. Davis to bolster the defense. Counsel, an experienced legal defender, requested a line-up prior to the preliminary hearing (R. 23-24). This record contains no details of that line-up, other than its result: Mr. Davis positively identified defendant (R.156: 93-94). Additionally, prior to trial, counsel submitted a complete "***Long***"[16] cautionary jury instruction, as did the State, which instructions were ultimately given by the court (R. 48-50, 73-75, 99-101). Both these

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Jannamon, 819 P.2d at 1025-26 (fundamental error to allow child sex abuse conviction to stand where no proof of victim's age even though defendant did not contest the issue below).

[16] ***State v. Long***, 721 P.2d 483, 492 (Utah 1986) (requiring a cautionary eyewitness jury instruction when requested by the defense).

actions evidence trial counsel's understanding of the legal aspects underlying eyewitness identification.

Counsel's cross-examination also demonstrated his understanding of the factual aspects of eyewitness testimony. The defense focused on the discrepancies noted by Mr. Davis during the show-up identification at the Hilton (R.156: 98-100). Contrary to defendant's current claim that the show-up was a product of "undue suggestion" (Br. App. at 24-25), the defense argued below that Mr. Davis's show-up identification was the "freshest" identification and, therefore, "the most likely to be accurate" (R.157: 190). By arguing that the show-up identification was the most reliable, the defense was able to use the differences in defendant's appearance noted by Mr. Davis to cast doubt on the overall evidence. The fact that the jury rejected this argument does not undercut its theoretical validity. ***State v. Hall***, 946 P.2d 712, 716-18 (Utah App. 1997) (defense counsel may strategically choose to admit otherwise inadmissible evidence, citing ***State v. Bullock***, 791 P.2d 155, 158-59 (Utah 1989)), *cert. denied*, 953 P.2d 449 (Utah 1998).

Therefore, for the trial court to have sua sponte excluded the show-up evidence would have fundamentally interfered with defendant's trial strategy, a strategy that defendant is bound by on appeal absent a claim of ineffective counsel. ***See e.g. Irwin***, 924 P.2d at 11 (cautioning against use of exceptions as a way to address the effectiveness of counsel even though no ineffectiveness is alleged or established); ***Dunn***, 850 P.2d at 1220 ("a party cannot take advantage of an error committed at trial when that party led

the trial court into committing the error"); ***Perdue***, 813 P.2d at 1205-06 ("where invited error butts up against manifest injustice, the invited error rule prevails").[17]

In sum, the trial court had no basis to believe it was committing error in allowing defense counsel to follow-through with what appeared to be a legitimate choice of strategy. Neither counsel's failure to object nor the evidence itself provided a basis from which the court should have sua sponte questioned the admissibility of the evidence.

C. Defendant Has Failed to Establish Exceptional Circumstances.

If defendant were correct that no evidence pointed to him as the Deseret Inn robber, then his conviction would indeed have to be reversed to avoid manifest injustice.[18] However, even defendant does not contend that there is *no evidence* to support his identification, only that the show-up identification was so inherently suggestive that any subsequent identifications must also be necessarily viewed as unreliable (Br. App. at 25). On this basis defendant claims exceptional circumstances.

Because defendant did not raise the reliability issue below, the record does not

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[17] In making this argument, the State does not mean to suggest that any error occurred; only that to the extent defendant claims any error on appeal, his actions and defense lead the trial court into committing it.

[18] "With the possible exception of an aberration or two, 'exceptional circumstances' is a concept that is used sparingly, properly reserved for truly exceptional situations, for cases – as our Supreme Court has recently recognized – involving 'rare procedural anomalies.'" ***Irwin***, 924 P.2d at 11 (quoting ***Dunn***, 850 P.2d at 1209 n.3). ***See also*** discussion footnote 10, *supra*, at 14.

contain full details surrounding the various identifications of defendant by Mr. Davis.[19] The record does establish that the show-up occurred within one hour of the robbery, presumptively to ensure that a basis for arrest existed despite defendant's denials and conflicting statements (R.156: 90, 99, 133-35). While defendant was in a business office with at least some police officers, it is unclear how many officers were there or if they were uniformed (R.156: 119, 125, 135, 149-50, 152-53, 166, 169-70). Defendant apparently was not handcuffed. ***Compare Ramirez***, 817 P.2d at 784 (during show-up, suspect was handcuffed to fence, illuminated by headlights, and surrounded by uniformed officers); ***State v. Rivera***, 954 P.2d 225, 229 (Utah App. 1998) (same).

Despite defendant's current claims of suggestiveness, it appears that Mr. Davis was especially observant and unwilling to positively identify defendant given the accessory (sweater and glasses) and hairstyle discrepancies. While any single-person show-up is more inherently suggestive than a multiple-person line-up, ***State v. Bruce***, 779 P.2d 646, 651 (Utah 1989), nothing in this record indicates that this show-up was unduly suggestive.

Nor does Mr. Davis's "less than 100 percent certain" identification nullify his subsequent positive identifications. It is, instead, simply a factor to be considered by the jury in determining what weight to accord the ultimate identification. ***State v. Baker***, 963

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[19] This lack of a fully developed record is one of the dangers the preservation rule seeks to avoid. ***See*** discussion of rationales behind rule, *supra*, at 19.

P.2d 801, 809 (Utah App.), *cert. denied,* 982 P.2d 88 (Utah 1998); ***Rivera***, 954 P.2d at 228; ***Lopez***, 886 P.2d at 1112; ***State v. Nebeker***, 657 P.2d 1359, 1362 (Utah 1983). This is especially true where Mr. Davis's description of the robber has remained consistent and he has never identified anyone other than defendant as the robber. ***Ramirez***, 817 P.2d at 783.

In sum, defendant has failed to establish any reason for this Court to believe that his conviction is legally insufficient or otherwise lacks reliable support.

* * *

Because defendant failed to preserve his challenge to the legal sufficiency of the evidence and has established no exception to the preservation requirement, this Court should not consider the merits of his claim for the first time on appeal.

POINT II

ALTERNATIVELY, TO THE EXTENT DEFENDANT'S GENERAL DEFENSE PRESERVED A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, THE EVIDENCE PROVIDES A REASONABLE BASIS TO SUPPORT THE VERDICT

In addition to defendant's first argument that (1) no preservation is required for a sufficiency claim in a criminal case, and (2) plain error and exceptional circumstances justify review in this case (***see*** Point I of both parties's briefs), defendant also claims that by merely defending against the criminal charge he has preserved his current sufficiency challenge (Br. App. at 17 & 22-26). This is incorrect. To the extent defendant's general defense may have preserved any challenge, it is merely a limited challenge to the

reasonableness of the jury's verdict.

Defendant's defense was predicted on Mr. Davis's show-up identification. But unlike his current claim of suggestiveness, at trial defendant argued that the jury should accept the reliability of Mr. Davis's identification:

> So what we want to look at is identification was made within an hour after the robbery. That's when it's freshest in [Mr. Davis's] mind, when he's most likely to make an accurate identification. And at that point he said he was only 50 percent sure. Why is he 50 percent sure? Because my client is pretty average. He's pretty average. Average height, average hair color, average build. The robber, I think Ms. Dent put it best, would be like the boy next door. That's the problem with this case, we have an average person who goes in there and robs a store.

(R. 157: 190). According to the defense, the discrepancies Mr. Davis observed at the Hilton were not simply changes in defendant's appearances but actual "differences" between defendant and the robber (R.157: 191-96). In addition, the circumstantial evidence was merely a series of coincidences:

> . . . I'll tell you what happened in this case. We have an average looking individual, young man, short brown hair, average build, average height, goes in the Deseret Inn. He holds the place up. He takes the cash, he runs down probably to the Hilton Hotel, even though we don't know that for sure, because no one saw him go in there. He goes in the Hilton Hotel, goes down, sits in the restaurant. He's sitting there. While he's sitting there he sees some commotion because another individual is being arrested. He goes, un-oh. First of all, he thinks he's gotten away with it, he thinks he's okay. So he goes to the hotel; he sits down. Now he sees some commotion going on.
>
> Now remember what happens is that there was police responding really quickly. If they get a call they are at the Hilton Hotel within five

> minutes.[20] So they come in, they arrest this individual. He is sitting there. He sees this happening, although now the police are nearer in the hotel. I'm in trouble, so he ditches the sweater. He goes across to the restroom, he ditches the gun there, then he splits out while they have my client in custody.
>
> My client is down there to meet his girlfriend and his friend, he's planning to have a good night out. There is a restaurant there, there is The Bay, is nearby, there's other bars around. And he brings his money. And as I've done on occasion, when I'm worried about being robbed, he put his money in his shoe. . . . You are going to go out at night, you are going to bring a lot of money with you. He is an average build, he is out in the lobby, he is on the phone, the police come up and grab him. That's what happened in this case.

(R.157: 200-01). The defense also used the police report's reference to Mr. Davis being "50 percent sure" during the show-up to argue that it was "not enough for the state to even [the scales], to make it 50 percent that he's guilty . . . you have to tip the scale all the way to beyond a reasonable doubt" before the jury could convict (R. 157: 199). (A copy of defendant's entire closing argument is attached in Addendum B.)

This general defense does not preserve the more specific identification challenge which defendant raises on appeal. ***Lopez***, 886 P.2d at 1113-14 (failure to raise a constitutional challenge to a line-up and photo array waives the issue on appeal); ***Olsen***, 860 P.2d at 334 (failure to challenge eyewitness identifications on constitutional grounds waived the issue for purposes of appeal); ***Larocco***, 665 P.2d at 1272-73 (refusing to

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[20] The police did not testify that they arrived at the Hilton five minutes after the robbery. One officer was dispatched at 6:25 p.m. to the Deseret Inn and arrived there about five minutes later; he then questioned Mr. Davis for about fifteen to twenty minutes before the two went to the Hilton (R.156: 133-34).

consider for the first time on appeal a claim of insufficient evidence predicated on a claim of a tainted line-up and photo spread); ***Wilson***, 608 P.2d at 1239 (recognizing that failure to challenge an in-court identification waives the issue for purposes of appeal, but then finding no suggestiveness in identification); ***State v. Middelstadt***, 579 P.2d 908, 909-10 (Utah 1978) (defendant cannot raise for the first time on appeal factual discrepancies in the evidence that he did not raise at trial).

Moreover, defendant's jury argument effectively conceded that the jury *could* convict defendant; the argument just pointed why, in defendant's opinion, a reasonable jury *would not*. In essence, defendant made this same concession by failing to move for dismissal or a directed verdict. ***See McDonough***, 248 F.2d at 727 (where no motion for acquittal is made at the end of the government's case, appellate court assumes evidence was sufficient to support verdict). ***Cf. State v. Smith***, 675 P.2d 521, 523 (Utah 1983) ("[i]f the State's evidence at the close of its case in chief does not establish a prima facie case against defendant, the Court must, as required by [Utah R. Crim. P.] Rule 17(o), dismiss the charge"). Having implicitly conceded the legal sufficiency of the evidence, the only argument colorably preserved by defendant's general defense is one of fact: *would* a reasonable juror have convicted him? That is, given the jury's prerogative to access the credibility of witnesses and the weight to be given particular evidence, does the

evidence provide a reasonable basis for the jury's verdict?[21]

The following evidence establishes a basis for the jury verdict of guilt.[22]

Defendant did not contest that:

1. On January 20, 1998, the Deseret Inn was robbed of $800 to $850.00.

2. The robber used a gun similar in appearance to a Crossman BB gun.

3. The robber was a young male who wore baggy blue pants, a gray oversized sweater, a white shirt underneath, and two metal hoop earrings, one in each ear.

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[21] In general terms, this is the same assessment made when a sufficiency challenge is preserved. That is, viewing the evidence in the light most favorable to the verdict, is the evidence:

> sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

Baker, 963 P.2d at 809. ***Accord State v. Chaney***, 1999 Utah Ct. App. 309, ¶ 30, 381 Utah Adv. Rep. 15 (citing ***State v. Brown***, 948 P.2d 337, 343 (Utah 1997)); ***State v. Wood***, 868 P.2d 70, 87 (Utah 1993); and ***State v. Johnson***, 821 P.2d 1150, 1156 (Utah 1991)).

But a defendant should not be allowed to avoid normal preservation requirements by cloaking an unpreserved legal claim, here the identification's inherent unreliability, within the general mantle of sufficiency. ***Accord Larocco***, 665 P.2d at 1272 (where defendant failed to object to line-ups or photo arrays below, he could not raise this issue as a sufficiency claim for the first time on appeal); ***Wilson***, 608 P.2d at 1239 (rejecting sufficiency argument predicated on unpreserved challenges to identification). ***Cf. Lopez***, 886 P.2d at 1113-14 (failure to challenge eyewitness identifications below cannot be raised for the first time on appeal). For this reason, the reliability of the identification evidence must be presumed. ***Chaney***, 1999 Utah Ct. App. 309, ¶ 30.

[22] Specific references to the record are contained in the State's Statement of Facts, *supra*, at 4-10. A comparison of the State's Statement of Facts and defendant's also demonstrates that defendant has failed to properly marshal all the evidence and inferences in favor of the jury verdict. This failure provides another ground for refusing to consider the merits of his appeal. ***State v. Decorso***, 1999 UT 57, ¶ 41, 370 Utah Adv. Rep. 11; ***Vessey***, 967 P.2d at 966.

4. When the robber left he appeared headed to the Hilton Hotel, about a block away.

5. The robber hid the gun used in the robbery in a trash can in a bathroom directly across from Annabella's Restaurant, inside the Hilton Hotel.

6. The robber entered Annabella's Restaurant wearing a gray sweater.

7. The robber left his gray sweater behind when he left Annabella's.

8. Defendant was detained at the Hilton Hotel shortly after the robbery and while, according to Ms. Dent and defense counsel, the robber was in the hotel.

9. When he was stopped by the police, defendant was at the closest public telephone to Annabelle's and the bathroom where the gun was found.

10. Defendant's height, weight, sex, age, skin color, hair color, and hair length were consistent with those of the robber's.

11. Defendant's baggy blue pants were consistent with those of the robber and those of the man observed walking away from the Deseret Inn and towards the Hilton.

12. Defendant had $850.00 in cash hidden in his shoes, the same amount taken in the robbery.

Additionally, the following evidence, though contested, established that:

13. Ms. Dent identified defendant as the person who wore the gray sweater into the restaurant and left it there. While defendant contested that he was the one who had left the sweater, he did not contest that the sweater was the robber's.

14. Without a sweater or coat, defendant was dressed unreasonably for the cold winter weather.

15. Defendant wore a metal hoop earring in each of his ears which earrings were, according to Mr. Davis, similar to the ones worn by the robber.

16. Defendant's hair color and length were the same as the robber. While the

hairstyle differed, defendant's hair was wet when stopped by the police from which it could be reasonably inferred that defendant washed or rinsed his hair in the hotel's bathroom at the same time that he hid the gun in the trash.

17. Defendant gave conflicting accounts of who he was going to meet. He told one officer he was meeting a male friend. He told another officer that he was meeting a female friend. And he told Ms. Dent in the restaurant that he was alone.

And finally, having viewed the robber in good light, at close range, and with an unobstructed view, ***Ramirez***, 817 P.2d at 782; ***Rivera***, 954 P.2d at 227,

18. Mr. Davis made a "less than 100 per cent" identification of defendant an hour after the robbery based on changes in defendant's appearance, which changes could reasonably be accounted for: defendant rinsed or washed his hair, got rid of his sweater, and put on glasses before being stopped by the police.

19. Mr. Davis positively identified defendant as the robber during a line-up.

20. Mr. Davis had "no doubt" at trial that defendant was the robber.

Given the totality of this evidence, the jury acted reasonably in convicting defendant. ***Decorso***, 1999 UT 57, ¶¶ 42-27, 370 Utah Adv. Rep. 11; ***Lopez***, 886 P.2d at 1112 (tentative initial identification did not negate subsequent positive in-court identification; evidence sufficient to convict); ***Nebeker***, 657 P.2d at 1362 (discrepancies between physical characteristics of described assailant and defendant went to credibility and were "best left" to the jury); ***Baker***, 963 P.2d at 809 (inconsistent, confused testimony coupled with failure to identify defendant in a line-up did not render evidence insufficient for conviction).

CONCLUSION

Based on defendant's failure to challenge the legal sufficiency of the evidence

below, this Court should refuse to consider the claim for the first time on appeal. Alternatively, to the extent defendant's closing argument may preserve a general challenge to the reasonableness of the verdict, the evidence provided a reasonable basis for defendant's conviction. This Court should affirm defendant's conviction for aggravated robbery.

RESPECTFULLY SUBMITTED this 14th day of January, 2000.

JAN GRAHAM
Attorney General

CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed to Kent R. Hart and John O'Connell, Jr, SALT LAKE DEFENDER ASSOCIATION, attorneys for defendant/appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 this 12 day of January, 2000.

ADDENDA

Addendum A

76-6-302. Aggravated robbery.

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Rule 17. The trial.

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(1) misdemeanor cases when defendant is in custody;

(2) felony cases when defendant is in custody;

(3) felony cases when defendant is on bail or recognizance; and

(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impanelled and sworn, the trial shall proceed in the following order:

(1) The charge shall be read and the plea of the defendant stated;

(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(3) The prosecution shall offer evidence in support of the charge;

(4) When the prosecution has rested, the defense may present its case;

(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(j) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions; and each juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(l) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the

defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(n) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(o) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Rule 23. Arrest of judgment.

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

it should be used, but the court should take advantage of special verdicts when specific issues cannot otherwise be reached. Baker v. Cook, 6 Utah 2d 161, 308 P.2d 264 (1957).

There is no impropriety in submitting special interrogatories if the court so desires. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

Trial court did not err in submitting special interrogatories instead of a general verdict as requested by plaintiff. This rule sanctions such procedure. Page v. Utah Home Fire Ins. Co., 15 Utah 2d 257, 391 P.2d 200 (1964).

Where jury answers to special interrogatories submitted on all disputed material issues are adverse to the defendant, the court properly entered judgment for the plaintiff. S & F Supply Co. v. Hunter, 527 P.2d 217 (Utah 1974).

Cited in Dixon v. Stewart, 658 P.2d 591 (Utah 1982).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

Am. Jur. 2d. — 75B Am. Jur. 2d Trial 1835 et seq.

C.J.S. — 88 C.J.S. Trial §§ 526 to 573.

A.L.R. — Submission of special interrogatories in connection with general verdict under Federal Rule 49(b), and state counterparts, 6 A.L.R.3d 438.

Quotient verdicts, 8 A.L.R.3d 335.

Competency of juror's statement or affidavit to show that verdict in civil case was not correctly reported, 18 A.L.R.3d 1132.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 A.L.R.3d 472.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 A.L.R.4th 9.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) *Motion for directed verdict; when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: conditional rulings on grant of motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the

appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Same: denial of motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 1004 et seq.
C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.

A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Rule 59. New trials; amendments of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grant of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 10, 1986, Pub.L. 99-646, § 54(a), 100 Stat. 3607; Apr. 29, 1994, eff. Dec. 1, 1994.)

Addendum B

WITH $850.00 IN HIS SHOES.

LADIES AND GENTLEMEN, THERE SIMPLY IS NO OTHER EXPLANATION. WE CAN, IN LIFE, ACCEPT A LOT OF FOIBLES OF HUMAN BEINGS, WE DON'T ALWAYS REMEMBER. FOR SURE THERE'S THINGS THAT HAPPENED WHEN WE GET FRIGHTENED, THERE'S UNSURITIES, THERE IS THINGS THAT POLICE DO. THERE IS A LOT OF TIME WE BREAK DOWN AS HUMAN BEINGS. WE ARE NOT EXPECTED TO STRETCH OUR IMAGINATIONS TO FIND A WAY THAT IS EVEN CLOSE TO REASONABLE TO FIND THE DEFENDANT NOT GUILTY. WE EXPECT AND RELY ON YOU AS REASONABLE PEOPLE TO LOOK AND JUDGE THE FACTS.

IF ONE LOOKS AT THESE REASONABLY THERE IS SIMPLY NO OTHER EXPLANATION THAT ALL OF THESE EVENTS COULD HAVE COME TOGETHER, THERE IS SIMPLY NO WAY FOR SOMEONE THAT LOOKS LIKE THE DEFENDANT, TO BE IN THAT CIRCUMSTANCE, DOING THOSE THINGS, WITH EVERYTHING ELSE, WITH THAT MONEY IN HIS POCKET. THAT IS BEYOND A REASONABLE DOUBT AND THAT IS WHY HE IS GUILTY. I ASK YOU TO FIND HIM SO. THANK YOU.

MR. O'CONNELL: YOUR HONOR, I'D LIKE TO BRING THE BOARD OVER. IF IT PLEASE THE COURT, COUNSEL, LADIES AND GENTLEMEN OF THE JURY. I'D LIKE TO USE THE BOARD HERE, AND THE JUDGE KNOWS

THAT. THAT IS MY SYMBOL FROM MY LAST ONE. ONE THING I WANTED TO START OUT RIGHT AWAY, AND I THINK THERE'S AN INSTRUCTION ON IT, WHAT WE SAY IN ARGUMENT IS NOT EVIDENCE. OKAY? I WANT YOU TO MAKE SURE THAT WHAT WE SAY IS NOT WHAT THE FACTS ARE. IT'S WHAT YOU REMEMBER THE FACTS ARE.

THE REASON I SAY THAT IS I'VE HEARD MR. PARKER'S CLOSING ARGUMENT. AND I DISAGREE TOTALLY ON SOME OF THE FACTS AS HE HAS LISTED. IN FACT, AS I RECALL THE EVIDENCE, THEY WERE COMPLETELY DIFFERENT. AND THAT IS UP TO YOU TO GO BACK TO YOUR RECOLLECTION AND REMEMBER THAT. I WILL GO THROUGH AND PICK OUT THE ONES WHERE I THINK HE HAS A DIFFERENCE.

NOW, THIS IS AN I.D. CASE. I DISAGREE WITH THE STATE. IT IS TOTALLY AN I.D. CASE. NOW THE OTHER EVIDENCE MAY COME AROUND TO SUPPORT THAT I.D. OR TAKE AWAY FROM THAT I.D., BUT TOTALLY I.D. CASES, OR ONE PERSON AT ALL WAS ABLE TO TESTIFY OR, IN THIS CASE, ANY IDENTIFICATION AT ALL, AND THAT WAS GREG DAVIS. AND THAT WAS ONLY 50 PERCENT LIKELY.

NOW WHAT'S IMPORTANT IN THIS CASE IS TO REMEMBER THAT THIS ROBBERY TOOK PLACE REALLY QUICKLY. IT WAS TWO TO THREE MINUTES. MOST OF

THE TIME MR. DAVIS IS LOOKING AT, FIRST HE'S LOOKING AT THE GUY'S POCKETS. YOU REMEMBER HE SAYS, HE WAS WATCHING THE GUY'S POCKETS AS HE WALKED IN BECAUSE HE THOUGHT SOMETHING WAS STRANGE. HE WAS KEEPING AN EYE ON HIS POCKETS. WHEN HE CAME UP HE PULLED OUT THE GUN, WHICH HE WAS HOLDING DOWN LOW. AND ANY REASONABLE PERSON IS GOING TO DO, YOU ARE GOING TO KEEP AN EYE ON AND SEE WHERE THAT GUN WAS POINTED, IF IT WAS POINTED ON YOU. HE SAID HE TRIED TO KEEP MOVING. HE HAD TO GO OPEN THE REGISTER, WHICH REQUIRES ATTENTION, OPEN IT UP, AND THEN HE WENT BACK TO THE BACK ROOM.

SO THE MOMENT HE HAD TO LOOK AT THE DEFENDANT WAS QUITE SHORT, WHICH WAS PROBABLY EVEN LESS THAN TWO MINUTES, BECAUSE MOST OF HIS TIME HIS ATTENTION IS NOT GOING TO BE AT THE ROBBER'S FACE.

THE REASON THAT'S IMPORTANT IS THAT WHAT'S MORE LIKELY TO BE CORRECT? WHEN YOU ONLY HAVE A FEW MINUTES TO LOOK AT SOMEBODY, WHEN IS YOUR IDENTIFICATION GOING TO BE MOST ACCURATE? AND THAT IS WHEN? THE SOONEST AFTER THE ROBBERY, BECAUSE WHEN TIMES GOES BY YOUR MEMORY IS GOING TO CHANGE, YOU ARE GOING TO HAVE THE PROBLEM OF

HAVING SEEN THE DEFENDANT FOR LONGER PERIODS OF TIME OR SEEN MR. RUDOLPH FOR LONGER PERIODS OF TIME, AND THIS IS GOING TO CLOUD YOUR JUDGMENT.

SO WHAT WE WANT TO LOOK AT IS IDENTIFICATION WAS MADE WITHIN AN HOUR AFTER THE ROBBERY. THAT'S WHEN IT'S FRESHEST IN HIS MIND, WHEN HE'S MOST LIKELY TO MAKE AN ACCURATE IDENTIFICATION. AND AT THAT POINT HE SAID HE WAS ONLY 50 PERCENT SURE. WHY IS HE 50 PERCENT SURE? BECAUSE MY CLIENT IS PRETTY AVERAGE. HE'S PRETTY AVERAGE. AVERAGE HEIGHT, AVERAGE HAIR COLOR, AVERAGE BUILD. THE ROBBER, I THINK MS. DENT PUT IT BEST, WOULD BE LIKE THE BOY NEXT DOOR. THAT'S THE PROBLEM WITH THIS CASE, WE HAVE AN AVERAGE PERSON WHO GOES IN THERE AND ROBS A STORE.

NOW MR. PARKER SAYS, I RULED OUT A WHOLE BUNCH OF PEOPLE. THAT IS A HUGE GROUP OF PEOPLE. THAT TAKES A HUGE GROUP OF PEOPLE, YOUNG MEN WITH SHORT BROWN HAIR. JUST IN THIS COURTROOM ALONE, I HAVE SHORT BROWN HAIR, MR. PARKER HAS SHORT BROWN HAIR, MR. RUDOLPH HAS SHORT BROWN HAIR. IT'S COMMON. IT'S COMMON CASE. SO WE TAKE SOMEBODY WHO IS THE AVERAGE BOY NEXT DOOR, HE GOES IN THERE AND GRABS SOMEBODY ELSE WHO IS AVERAGE. THAT'S WHY HE'S 50 PERCENT

SURE BECAUSE THEY'RE BOTH AVERAGE.

NOW THE STATE SAYS THE REASON WHY HE'S ONLY 50 PERCENT SURE IS BECAUSE HE CHANGED HIS APPEARANCE. I WANT TO TELL YOU IT IS NOT CHANGES, THESE ARE DIFFERENCES. THE STATE'S JUST TRYING TO EXPLAIN AWAY THE CHANGE IN HIS APPEARANCE. THESE ARE DIFFERENCES BETWEEN THE ACTUAL ROBBER AND MY CLIENT.

ONE. I THINK THE MOST IMPORTANT IS HIS GLASSES. THE ROBBER DID NOT HAVE GLASSES ON. CAME INTO THE STORE, NO GLASSES. MY CLIENT HAD GLASSES ON WHEN HE WAS ARRESTED. HE WAS WITH A POLICE OFFICER WHO TESTIFIED HE HAD GLASSES ON, WHEN THEY PUT HIM IN THE ROOM HE HAD GLASSES ON. NOW, THAT'S CRUCIAL. NOW THE STATE'S SAYING BECAUSE -- WHEN HE ROBBED THE PLACE HE WASN'T WEARING HIS GLASS. WHY? WHY WOULD THE ROBBER HAVE TAKEN OFF HIS GLASSES FOR THE ROBBERY?

TWO. WHERE DID HE PUT THEM? HE ONLY HAD LEVI'S AND A SWEATER ON. SUPPOSEDLY, IF ANYBODY WEARS GLASSES THEY ARE NOT GOING TO PUT THEM IN A POCKET BECAUSE THEY'RE GOING TO GET CRUSHED, UNLESS THE ROBBER THOUGHT HE WAS GOING TO DO A SUPERMAN DEFENSE. CLARK KENT TAKES OFF HIS. HE'S SUPERMAN. OBVIOUSLY, THIS ROBBER

DIDN'T WEAR A MASK DISGUISE AND TAKE OFF HIS GLASSES IN AN ATTEMPT TO CONFUSE PEOPLE. HE HAS GLASSES ON. THAT'S HUGE. THAT IS A BIG DIFFERENCE BETWEEN MY CLIENT AND THEIR CLIENT.

TWO. THE COLOGNE. THE ROBBER HAD COLOGNE. AND AGAIN I WANT YOU TO LOOK BACK. I MEAN, HE TESTIFIES, HE IS KIND OF WAFFLING, KINDA MAKES IT SOUND LIKE IT MIGHT HAVE BEEN COLOGNE, JUST STRONG MOUSSE, BUT WHEN AGAIN, BACK WHEN HE WAS AT THE SCENE, HE TOLD THE OFFICER THAT THE ROBBER SMELLED OF COLOGNE. AND THAT MY CLIENT, WHEN HE WAS ARRESTED, AND I DON'T KNOW IF THE OFFICERS TESTIFIED THAT THE WITNESS SAID HE HAD COLOGNE, OR HE SMELLED MY CLIENT, BUT IN HIS STATEMENT THAT GUY DID NOT SMELL OF COLOGNE.

TURTLENECK. MR. MC CANN SAID BACK THEN HE THOUGHT THE INDIVIDUAL HAD A TURTLENECK ON. NOW HE SAYS HE IS NOT SO SURE. THAT'S BECAUSE TIME HAS GONE PAST, NOW HE SEES THEY HAVE A T-SHIRT AND NOT A TURTLENECK. OF COURSE HE'S GOING TO START SAYING, WELL, MAYBE I AM NOT SO SURE. HE'S GOING TO CHANGE HIS TESTIMONY TO FIT WHAT THE EVIDENCE IS, BUT BACK THEN HE SAID THE ROBBER HAD A TURTLENECK.

THE EARRINGS. NOW I ASKED THE GANG

TASK OFFICER, AND I'M GLAD HE WAS HERE, BECAUSE HE TESTIFIED THAT IT'S NOT UNCOMMON FOR THE YOUTH OF UTAH, ESPECIALLY THE ONES HE DEALS WITH DOWNTOWN, TO BE WEARING BAGGY LEVI'S. THAT'S COMMON. IT IS NOT UNCOMMON FOR THEM TO BE WEARING EARRINGS. JUST THE FACT THAT HE HAD EARRINGS ON DOESN'T REALLY MEAN MUCH, BUT THIS IS WHERE I DISAGREE WITH WHAT THE WITNESS SAID.

HE SAID -- HE DIDN'T SAY HE DOESN'T REMEMBER WHETHER OR NOT HE HAD ANY ORNAMENTATION, HE SAID ON THE STAND HE REMEMBERS THEM BEING PLAIN. PLAIN EARRINGS. IF YOU LOOK AT THOSE EARRINGS THEY AREN'T PLAIN. THEY LOOK LIKE WEDDING BANDS. SO WE HAVE PLAIN, FAIRLY THICK LOOKING EARRINGS ON THE ROBBER. HE ALSO SAID, TOLD THE POLICE THAT THEY WERE GOLD, AND AT ANOTHER HEARING PRIOR TO THIS WHEN HE TESTIFIED ON THE STAND UNDER OATH, AGAIN HE SAID THAT THE EARRINGS WERE GOLD. TODAY HE SAYS THEY MAY HAVE BEEN GOLD OR SILVER.

NOW THAT KINDA DEMONSTRATES A PROBLEM WITH THE STATE'S CASE AND THEIR PROBLEM WITH MEMORY IN GENERAL. BACK THEN, RIGHT AFTER THE INCIDENT, HE IS SURE THEY'RE GOLD, BUT AFTERWARDS, AFTER BEING MORE INVOLVED IN THE

CASE, FINDING OUT THAT THE EARRINGS ON THE DEFENDANT AREN'T GOLD, HE STARTS CHANGING HIS TESTIMONY, CHANGING IT JUST ENOUGH THAT IT STARTS FITTING. NOW HE IS NOT SURE, THOUGH, IF THEY'RE GOLD OR SILVER. THAT IS BECAUSE HE WANTS TO BE HELPFUL. I DON'T THINK HE'S LYING, BUT I THINK HE WANTED TO MAKE THE CASE BETTER SO HE'S NOT SWITCHING TO GOLD OR SILVER. BACK THEN HE SAID THEY WERE GOLD.

THE STATE ALSO TALKS ABOUT OTHER THINGS. HE WASN'T WEARING A SWEATER. NO GRAY SWEATER WHEN HE WAS ARRESTED. NOW THE STATE MAKES A DEAL OUT OF THE FACT WHEN HE WAS ARRESTED HE WASN'T WEARING A COAT OR SWEATER. AND IT WAS COLD OUT IN JANUARY. I SHOULD POINT OUT HE WASN'T ARRESTED OUTSIDE, HE WAS ARRESTED INSIDE. SO IT WASN'T SURPRISING HE WASN'T WEARING HIS COAT AT THE TIME. WHEN THE GANG TASK FORCE ASKED HIM IF THIS WAS YOUR SWEATER, HE TOLD HIM NO, I HAD A COAT. SO HE DID HAVE A COAT. HE JUST DIDN'T HAVE 'EM ON HIM. AND I'M SURE THE STATE AGAIN IS GOING TO POINT OUT WHERE THE FACT ONE OF THE OTHER OFFICERS ASKED HIM, IT'S COLD OUTSIDE, AND MY CLIENT SAID HE DID HAVE A COAT.

BUT I WANT TO MAKE ANOTHER POINT. ALL

THE STATEMENT'S MY CLIENT MADE, THE POLICE RELAYED TO YOU, ARE JUST SHORT, ONE BIT STATEMENTS TAKEN OUT OF CONTEXT. THE OFFICER ASKED HIM, ARE YOU WEARING A COAT, NO, I'M NOT. HE WASN'T WEARING A COAT. ANOTHER OFFICER COMES UP AND GOES, IS THIS YOUR SWEATER? HE SAYS, YEAH, I HAD A COAT. THEY'RE NOT INCONSISTENT. THE ONE STATEMENT IS TAKEN OUT OF CONTEXT. HE DID HAVE A COAT ON AT THE TIME. AND THAT'S PROBABLY WHAT HE WAS ANSWERING TO THE OFFICER. THE OTHER OFFICER EXPLAINS HE HAS A COAT. I BET IF THEY LOOKED AROUND, LOOKED AROUND THE HOTEL, LOOKED IN LOST AND FOUND WHERE IT PROBABLY IS NOW, THEY WOULD HAVE FOUND MY CLIENT'S COAT.

CHANGES. THE STATE AGAIN MAKES A BIG DEAL WITH THE FACT MY CLIENT ALLEGEDLY CHANGED HIS APPEARANCE. THEY SAY HE LOOKED LIKE HE WAS WASHED. BECAUSE HIS HAIR WAS WET. NOW THIS ACTUALLY, IN SOME WAYS, IS A BAD FACT FOR US, BUT I THINK IT KINDA SHOWS YOU WHERE THE STATE'S WRONG HERE. IF YOU WILL RECALL, OFFICERS SAID HIS HAIR, MY CLIENT'S HAIR, LOOKED WET AND KINDA SPIKY. AND IF YOU GO BACK TO THE ROBBERY, WHAT DOES GREG DAVIS SAY HIS HAIR LOOKED LIKE? KINDA WET AND SPIKY.

NOW I SAY THAT IS A BAD BREAK FOR US BECAUSE IT SEEMS LIKE A SIMILARITY BETWEEN THE TWO OF THEM, BUT I THINK THAT'S COMMON WHERE MOST YOUTH, INDIVIDUALS TODAY, PUT MOUSSE IN THEIR HAIR, WEAR IT SHORT, AND WEAR IT SPIKY. WELL, THE STATE GOES, HIS HAIR WAS WET SO HE WAS OBVIOUSLY CHANGING HIS APPEARANCE, TRYING TO MAKE HIMSELF LOOK DIFFERENT, BUT HE DIDN'T LOOK DIFFERENT. AT LEAST HIS HAIR DIDN'T LOOK DIFFERENT. BUT REMEMBER WHEN GREG DAVIS GOES IN AND SEES HIM? HE KNOWS HIS HAIR IS DIFFERENT, BUT HE CAN'T IDENTIFY HIM. HE HAS MY CLIENT, DIDN'T DO ANYTHING TO CHANGE HIS APPEARANCE, SIMILARITIES BETWEEN HIM AND THE ROBBER, BUT HE WAS UNABLE TO IDENTIFY HIM.

NOW I WANT TO TALK ABOUT THE MONEY, BECAUSE THE STATE MAKES AN ISSUE ABOUT THE MONEY. IT IS, AGAIN, WHERE I DISAGREE WITH THEM. THEY SAY APPROXIMATELY 800.00 TO $850.00 WAS TAKEN. WE DON'T KNOW THAT. WE DON'T KNOW HOW MUCH MONEY WAS TAKEN. THE PERSON WHO ACTUALLY COUNTED AND DECIDED HOW MUCH MONEY NEVER CAME AND TESTIFIED TODAY AND TOLD US HOW MUCH MONEY WAS TAKEN. AGAIN WE ARE RELYING ON GREG DAVIS' MEMORY OVER A YEAR LATER, AFTER HE'S PROBABLY FOUND OUT WHAT

THE FACTS WERE, HOW MUCH MONEY WAS TAKEN FROM THE ROBBERY. AND NOW HE APPROXIMATES THAT ABOUT $800.00 WAS TAKEN. HE DOESN'T KNOW HOW MUCH MONEY WAS TAKEN. HE JUST KNOWS THE FACTS OF THIS CASE AND HE'S APPROXIMATING HOW MUCH MONEY WAS TAKEN. FOR ALL WE KNOW THERE MAY HAVE BEEN $400.00 IN THERE, BECAUSE THERE'S ALWAYS $400.00 IN THE TILL. THAT'S IT. SO IT ISN'T COINCIDENCE THEY HAD 850.00 WAS TAKEN. HE DIDN'T KNOW HOW MUCH WAS TAKEN, WE DON'T KNOW HOW MUCH WAS TAKEN, THE STATE HASN'T SHOWN US HOW MUCH MONEY WAS TAKEN. IT'S SOMETHING THAT WAS UNKNOWN. OKAY?

I JUST WANT TO POINT OUT OTHER THINGS ABOUT MR. DAVIS. THE FACT THAT, YOU KNOW, HE COULD GET THE MONEY WRONG. HE GETS THE ADDRESS OF WHERE HE WORKS WRONG. OKAY? A YEAR AGO HE WORKS AT THIS PLACE AND HE THINKS IT IS 500 SOUTH 200 WEST. IT WASN'T UNTIL MR. PARKER CORRECTS HIM, AND ISN'T IT REALLY 50 WEST, THAT HE CHANGED IT. HE GETS THE ADDRESS WRONG. HE IS NOT EXACTLY SURE WHAT THE TIME WAS. IT MIGHT HAVE BEEN 6:00 OR 7:00. HE ADMITS TO IT BEING A LONG TIME AGO AND HE CAN'T ALWAYS REMEMBER ALL THE DETAILS AND HE DIDN'T COUNT THE MONEY SO WE DON'T KNOW HOW MUCH MONEY WAS TAKEN.

AGAIN, I WANT TO TALK A LITTLE BIT ABOUT THE STATEMENT BECAUSE MR. PARKER SAYS MY CLIENT MADE INCONSISTENT STATEMENTS. AGAIN, WE HEARD JUST ONE SHORT PHRASE FROM SEVERAL DIFFERENT OFFICERS AND THEY WERE COMPLETELY TAKEN OUT OF CONTEXT. WE DON'T KNOW WHAT THE CONTEXT WAS, WHAT OTHER STATEMENTS WERE MADE, WE DON'T KNOW WHAT THE WHOLE CONVERSATION WAS. THESE STATEMENTS BY THEMSELVES MAY LOOK INCONSISTENT. HE WAS THERE TO MEET HIS FRIEND, HE WAS THERE TO MEET HIS GIRLFRIEND, HE WAS THERE TO MEET BOTH OF THEM. HE JUST TOLD TWO DIFFERENT OFFICERS. ONE HE TOLD HE WAS MEETING HIS FRIEND. THAT IS WHAT HE BROUGHT UP. AND THE OTHER HE TOLD HE WAS GOING TO MEET HIS GIRLFRIEND.

AGAIN, ABOUT THE COAT, HE TELLS ONE OFFICER AT ONE POINT HE WAS WEARING A COAT AND ANOTHER TIME HE WAS WEARING A COAT. AGAIN, THESE STATEMENTS ARE TAKEN OUT OF CONTEXT. IF WE KNEW THE WHOLE CONTENTS OF THE CONVERSATION, HOW IT ALL WENT, THEY WOULDN'T LOOK INCONSISTENT.

I WANTED TO TALK A LITTLE BIT ABOUT REASONABLE DOUBT. NOW THE VERY EXPERIENCED DEFENSE ATTORNEY ONCE DEMONSTRATED REASONABLE DOUBT AND DID THE BEST JOB OF TRYING TO EXPLAIN, BECAUSE IT IS

NOT EASY. WHAT'S BEYOND A REASONABLE DOUBT? WE KNOW IT IS THE HIGHEST STANDARD IN THE CRIMINAL, NOT EVEN THE CRIMINAL JUSTICE SYSTEM, IN THE JUSTICE SYSTEM ALL TOGETHER. IT IS A HIGHEST STANDARD. WHAT DOES REASONABLE DOUBT MEAN? NOW THERE ARE WAYS TO SHOW IT, EXPLAIN IT, AND I THOUGHT MAYBE YOU CAN BETTER VISUALIZE IT, IS LOOKING AT THE SCALES OF JUSTICE. WE HAVE THESE SCALES BALANCED EVENLY. YOU ALWAYS SEE 'EM ON THE COURTHOUSE, THE WOMAN HOLDING THE SALES OF JUSTICE. NOW THE SCALES DON'T START OUT EVENLY, OKAY, LIKE MOST SCALES DO. THAT IS BECAUSE THERE IS A PRESUMPTION OF INNOCENCE. MR. RUDOLPH IS PRESUMED TO BE INNOCENT SO THE SCALES ARE TIPPED ALL THE WAY IN HIS FAVOR. AND IT IS NOT ENOUGH FOR THE STATE TO EVEN THEM, TO MAKE IT 50 PERCENT THAT HE'S GUILTY. IF THAT'S THE CASE, HE IS NOT GUILTY, IT IS NOT ENOUGH TO TIP THE SCALES TO HIS ADVANTAGE. THAT'S PREPONDERANCE OF THE EVIDENCE. THAT IS A CIVIL STANDARD. IT IS NOT ENOUGH TO GO TO CLEAR AND CONVINCING EVIDENCE, WHICH IS ANOTHER CIVIL STANDARD. YOU HAVE TO TIP THE SCALE ALL THE WAY TO BEYOND A REASONABLE DOUBT. SO THE SCALE GOES FROM PRESUMPTION OF INNOCENCE ALL THE WAY TO BEYOND A REASONABLE DOUBT. ALL THE DEFENDANT HAS TO DO IS

TIP THE SCALE TO, BACK TO BELOW BEYOND A REASONABLE DOUBT. NOT MUCH OF A STANDARD.

NOW WHY IS THERE REASONABLE DOUBT IN THIS CASE? I THINK I'VE GONE THROUGH GENERALLY, BUT I'LL TELL YOU WHAT HAPPENED IN THIS CASE. WE HAVE AN AVERAGE LOOKING INDIVIDUAL, YOUNG MAN, SHORT BROWN HAIR, AVERAGE BUILD, AVERAGE HEIGHT, GOES IN THE DESERET INN. HE HOLDS THE PLACE UP, HE TAKES THE CASH, HE RUNS DOWN PROBABLY TO THE HILTON HOTEL, EVEN THOUGH WE DON'T KNOW THAT FOR SURE, BECAUSE NO ONE SAW HIM GO IN THERE. HE GOES IN THE HILTON HOTEL, GOES DOWN, SITS IN THE RESTAURANT. HE'S SITTING THERE. WHILE HE'S SITTING THERE HE SEES SOME COMMOTION BECAUSE ANOTHER INDIVIDUAL IS BEING ARRESTED. HE GOES, UH-OH. FIRST OF ALL, HE THINKS HE'S GOTTEN AWAY WITH IT, HE THINKS HE'S OKAY. SO HE GOES TO THE HOTEL; HE SITS DOWN. NOW HE SEES SOME COMMOTION GOING ON.

NOW REMEMBER WHAT HAPPENS IS THAT THERE WAS POLICE RESPONDING REALLY QUICKLY. IF THEY GET A CALL THEY ARE AT THE HILTON HOTEL WITHIN FIVE MINUTES. SO THEY COME IN, THEY ARREST THIS INDIVIDUAL. HE IS SITTING THERE. HE SEES THIS HAPPENING, ALTHOUGH NOW THE POLICE ARE NEARER IN THE HOTEL. I'M IN TROUBLE, SO HE DITCHES THE

SWEATER. HE GOES ACROSS TO THE RESTROOM, HE DITCHES THE GUN THERE, THEN HE SPLITS OUT WHILE THEY HAVE MY CLIENT IN CUSTODY.

MY CLIENT IS DOWN THERE TO MEET HIS GIRLFRIEND AND HIS FRIEND, HE'S PLANNING TO HAVE A GOOD NIGHT OUT. THERE IS A RESTAURANT THERE, THERE IS THE BAY, IS NEARBY, THERE'S OTHER BARS AROUND. AND HE BRINGS HIS MONEY. AND AS I'VE DONE ON OCCASION, WHEN I'M WORRIED ABOUT BEING ROBBED, HE PUT HIS MONEY IN HIS SHOE. WHEN I WAS BACK IN COLLEGE, BEFORE I HAD CREDIT CARDS, I USED TO CARRY QUITE A BIT OF CASH ON ME. THAT'S WHERE I WOULD CARRY IT BECAUSE I WOULD BE VERY PARANOID. I USED TO GO TO SCHOOL IN NEW YORK SO IT'S A DIFFERENT FACTOR, BUT I ALWAYS CARRIED IT IN MY SHOE AS WELL. THAT'S NOT TOO SURPRISING. AND WHEN YOU DON'T HAVE CREDIT CARDS YOU RELY ON CASH. YOU ARE GOING TO GO OUT AT NIGHT, YOU ARE GOING TO BRING A LOT OF MONEY WITH YOU. HE IS AN AVERAGE BUILD, HE IS OUT IN THE LOBBY, HE IS ON THE PHONE, THE POLICE COME UP AND GRAB HIM. THAT'S WHAT HAPPENED IN THIS CASE. AND I WOULD ASK YOU TO FIND MY CLIENT NOT GUILTY.

THE COURT: MR. PARKER?

MR. PARKER: I GUESS WHAT I WANT TO DO IS ADDRESS A COUPLE OF THINGS. AND I DON'T WANT